United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

75-4266

In The

UNITED STATES COURT OF APPEALS

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No. 75-4266

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
AFL-CIO and NEW YORK SHIPPING ASSOCIATION, INC.,

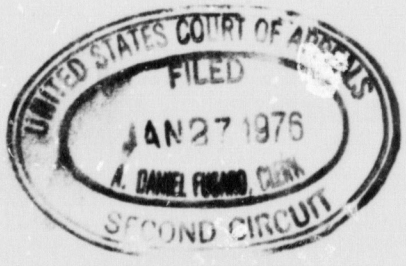
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF AMICUS CURIAE OF MARITIME PORT COUNCIL
OF GREATER NEW YORK AND VICINITY



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I

THE IMPORTANCE OF THIS PROCEEDING
TO THE PORT OF NEW YORK.

Maritime Port Council of Greater New York and Vicinity ("Port Council") is comprised of upwards of 100 local unions and district bodies, representing tens of thousands of workers employed in the Port of New York. Port Council is a local affiliate of

Maritime Trades Department, a constitutional department of American Federation of Labor-Congress of Industrial Organizations.

If enforcement of the Board's decision in the instant case is granted, then the effects upon the immediate petitioner parties, International Longshoremen's Association ("ILA") and New York Shipping Association, Inc. ("NYSA") would plainly be disastrous. The ILA will lose approximately 2,500 members and NYSA employer members will lose substantial business. But most critical, the Port of New York, its work force and supporting maritime industries will be most seriously adversely affected. The detrimental effect of allowing the LCL and LTL containers, consolidated within 50 miles of the Port of New York, to be handled without regard to the traditional longshoremen's work jurisdiction at the piers in the Port, cannot be limited to the petitioner parties. Those many other thousands of workers in the Port, and their employers, who are dependent upon the smooth functioning and continued prosperity of the Port of New York, and paramount, its competitiveness with other ports, will be seriously jeopardized in their employment and in their business.

Waterfront labor relations have emerged over the past few decades from what has been sometimes referred to as a "jungle"

to a condition that no longer suffers from the many disruptions of the past. For example, there is summarized in 1969 Labor Relations Year Book, 676-77, (BNA), a report on "National Emergency Disputes under the Labor Management Relations Act," (BLS Bulletin No. 1482), which treated with national emergency disputes for the period 1947-1968. The stevedoring industry in the United States was responsible for 25% of such disputes during that period. Of the seven national emergency disputes which resulted in strikes and were settled only after the national emergency injunction had been dissolved, six involved longshoremen and their employers on the Atlantic and Gulf coasts, all the employees of which were represented by ILA; the Port of New York was the fulcrum of those strikes. That period, marked by so much industrial disruption, has given way to relative peace on the waterfront. The collective bargaining between ILA and NYSA has demonstrated an ingenuity to resolve the problems constantly plaguing the Port of New York, especially the problems arising from technological change and automation on the waterfront, and more particularly the problems resulting from containerization. There was justified confidence that the natural concomitant of stable labor relations on the waterfront in the longshore industry would be stable labor relations in the entire

Port of New York. The importance of that condition to the people of the City of New York cannot be under-estimated. Thus, we were advised by John V. Lindsay, then Mayor, in the New York Times of November 22, 1970, Section 13, a special section devoted to the Port of New York, that it is the largest natural harbor in the world, comprising 578 miles of waterfront, and that 40% of the men and women who work in the City of New York hold jobs which are involved, in one way or another, with waterfront commerce.

The Board's decision in the instant case, as we demonstrate below, constitutes the greatest threat to the prosperity and stable labor relations of this Port that has been encountered in its recent history of labor-management relations.

II

THE BOARD'S CRUCIAL FINDING OF FACT, THAT ILA HAD ABANDONED ITS CLAIM TO THE WORK IN CONTROVERSY, IS MANIFESTLY WITHOUT SUPPORT IN THE RECORD AS A WHOLE.

The question which we address here is how it came about that the carefully crafted vessel of industrial peace was

flattened by the Board's blunderbuss decision. How was it possible that the conscientiously refined bargain which the parties had constructed for more than the past decade, so as to deal with the technological changes brought about by the containerization of cargo could have been so completely unraveled by the National Labor Relations Board? What was the Achilles heel which immobolized a collective bargaining relationship that had resulted in industrial tranquility in the Port of New York?

The ingenuity used by the parties to resolve the always baffling problems of technological change and automation resulted in an entire interdependent scheme including, among many other things, improved and early retirement, seniority structure and a guaranteed annual income ("GAI") for all regular longshoremen as a quid pro quo for relinquishing 80% of container work in the Port. The GAI was supported, as were other interdependent items of the bargained for and agreed upon industrial scheme, by a tonnage tax. That cornerstone of i dustrial peace in the Port is now, without rational relation to any operative facts of industrial life in the Port, in precarious position.

The mystery for this deepens because the Administrative

Law Judge in this case, Arnold Ordman, had for many years been General Counsel of the National Labor Relations Board, and was nationally recognized as possessed of the greatest expertise in labor relations and the problems of the National Labor Relations Act. In his opinion below, he traced the bargaining history of ILA and NYSA as it related to containers and found that the complex bargains over the years, which gave the longshoremen a guaranteed annual income but only 20% of the containerization cargo in the Port of New York, was a collective bargaining construct which had as its purpose the preservation of the work opportunities of the longshoremen. Having so found, he was bound to conclude, as he did, that such an attempt at work preservation did not run afoul of §8(b)(4)(B) or §8(e) and was well within the parameters set forth by the Supreme Court in National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612 (1967).

How was it possible for the Board to have concluded that such an expert had gone so awry in his findings? He had traced the bargains of the parties for more than one-quarter of a century and, it seemed, traced them unerringly. How did agreement after agreement, plainly directed at work preservation, lose its

character as such? The Board made the crucial finding, overruling the ALJ, that the ILA had in its 1959 agreement "abandoned that claim by its 1959 contract with NYSA". The alleged abandonment of the work is claimed by the Board to be justified by the ambiguous language of Section 8(a) of the 1959 agreement. However, the parties to that agreement contended, and the ALJ so found, that Section 8(c) of that very same agreement indicated not an abandonment but a continued claim by the ILA to the work of stripping and stuffing containers. The Board's finding of abandonment is surely negated by its explicit finding in footnote 16 of its opinion that:

> "While the record does not reveal the extent to which longshoremen have engaged in stripping and stuffing containers, it is clear that longshoremen have performed these functions on the piers on behalf of shippers since the advent of containerization."

Reading the Board's footnote 16 and the Board's "finding" of abandonment of the work by the ILA almost impels one to the conclusion that the Board's opinion was authored by several persons who did not consult with one another. In any event, such a "finding" cannot meet the test of Universal Camera Corp. v. NLRB, 340 U.S. 474, 491 (1951) that the order of

the Board must be supported by "substantial evidence on the record as a whole".

We are not dealing here with a question in which this Court will defer to the expertise of the Board. The Board's "finding" is merely the interpretation of the contract. Apposite here is Chief Judge Bazelon's statement in Retail Clerk's International Association, Etc. v. NLRB, 510 F.2d 802, 805 (D. C. Cir. 1975) that:

> "The Board's 'waiver' argument in [sic-is] couched in terms of contract interpretation. Though we recognize that it is interpretation with an eye to existing labor policy, a certainly permissible practice, it is interpretation nevertheless. The Board's argument to the extent it relies on contract interpretation alone, and not enunciation of policy, is entitled to no particular deference." (footnote omitted).

Whether couched in terms of waiver or abandonment, it is plain that the Board's interpretation of Section 8(a) of the 1959 collective bargaining agreement relies on contract interpretation alone, is not an enunciation of any labor policy within the Board's expertise, and is consequently entitled to no deference. In accord is Iron Workers Local Union No. 167, Etc. v. NLRB, 517 F.2d 183, 186, n. 10 (D. C. Cir. 1975).

> "The Board's interpretation of the Administrative Committee agreement is not informed by any labor policy but is merely contract interpretation. It is therefore entitled to no deference."

In the instant case the Board's interpretation of the crucial paragraph of the 1959 agreement is entitled to much less than deference. Both parties to the agreement are in accord that ILA never abandoned its claim to the work of stripping and stuffing the LCL and LTL containers here at issue. Moreover, not only had that been the practical construction given to Section 8(c) of the contract by the parties, but the ILA had continued to claim that work and to do that work. The Board's "finding" of abandonment runs afoul of the long standing canon of contract construction that deference will be given to the practical or contemporaneous construction of the parties themselves. That canon is applicable to labor contracts as well as to others, Pekar v. Local Union No. 181, 311 F.2d 628, 633 (6th Cir. 1962), cert. den. 373 U.S. 912:

> "When parties by their uniform conduct over a period of time have given a contract a particular construction, such construction will be adopted by the courts."

The Board was not a party to the 1959 agreement between

ILA and NYSA. The Board was not called upon to place a practical interpretation upon that agreement. It was the parties themselves who interpreted it and their interpretation must now be dispositive of the question. NLRB v. Universal Services, Inc. Etc., 467 F.2d 579, 585 (9th Cir. 1972).

> "Such a practical interpretation placed upon an agreement by the parties is often of dispositive importance in determining their intent and the purposes of the obligation." (footnote omitted)

Accord, Lewis v. Hixson, 174 F. Supp. 241, 248 (W. D. Ark. 1959); Amalgamated Local 877, Etc. v. United Aircraft Corp., 120 F. Supp. 186, 187 (D. Conn. 1952).

In the face of such a practical construction of the contract by the parties themselves, the interpretation placed upon it by the Board, to which absolutely no deference is owed, surely does not rise to the dignity of "substantial evidence on the record as a whole". Universal Camera, supra.

The consequences of the Board's construction of the 1959 agreement as an abandonment of the work at issue, are near catastrophic. Chapter and verse are recited in the affidavits in support of the motion to expedite this appeal. The loss of approximately 2,500 jobs of longshoremen engaged in the stripping

and stuffing of LCL and LTL containers will put an intolerable burden upon the financing of the GAI in the Port of New York. Additional taxes must be levied on the tonnage entering and leaving the Port. The aforementioned affidavits make it perfectly plain that shippers, rather than subjecting themselves to the increased tonnage tax, will in substantial and injurious measure abandon the Port of New York. It is intolerable that such an abandonment of the Port by the shippers should result from the Board's finding of an abandonment which rests on nothing more substantial than an interpretative conclusion without support in fact or law.

III

CONTROLLING AUTHORITY HOLDS THAT PRESERVATION OF WORK FROM THE INROADS OF TECHNOLOGICAL CHANGE AND AUTOMATION, AS IN THE INSTANT CASE, IS PRIMARY ACTIVITY NOT VIOLATIVE OF EITHER SECTION 8(b)(4)(B) or SECTION 8(e).

We find it passing strange that the Board did not think it necessary to distinguish this Court's decision in Intercontinental Container Transport Corporation v. New York Shipping Association, 426 F.2d 884 (2nd Cir. 1970). There the

plaintiff, a consolidator of LCL and LTL containers, just as the charging parties in the instant case, complained that the collective bargaining agreement between NYSA and ILA, requiring the stuffing and stripping of the containers on the piers, constituted a conspiracy in violation of the Sherman Act. With telling analysis of the history and objectives of the bargaining, this Court concluded that the activity complained of was work preservation within the area of proper union concern and was not a violation of the anti-trust laws.

It is of no moment that Intercontinental Container arose under the Sherman Act. Identical measuring rods are used both under the Sherman Act and the National Labor Relations Act in determining whether a work preservation boycott is primary or secondary--in the first event non-actionable and in the second event actionable, under either Act. Since this Court has found that the very activity here complained of on the New York piers constitutes "work preservation" by the ILA, Intercontinental Container, 426 F.2d at 887, we suggest that the matter is now foreclosed and that the principle of stare decisis is dispositive of this case.

That the criterion for the determination of "work preservation" in both the Sherman Act and National Labor Relations Act cases is identical is best illustrated by the reliance of this Court in Intercontinental Container (ibid.) upon National Woodwork Mfg. Assoc. v. NLRB, 386 U.S. 612 (1967) and Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964). More than coincidentally, the Supreme Court in National Woodwork relied upon case after Sherman Act case in determining that a work preservation boycott was not a violation of the National Labor Relations Act, 386 U.S. at 621 et seq.

It goes without saying that the container rules attacked by the charging parties and smashed by the Board, are an attempt to deal with technological changes in the industry. The very holds of the vessels--the cargo carrying areas--have been removed from the innards and placed upon the piers or, in some instances, moved more than 50 miles from the vessels. The effect of such changes has been, of course, enormous. The efforts to deal with such changes have been as challenging as any that an industrial society has had to face. Moreover, there is nothing clearer in the legislative history of the Taft-Hartley Act and in the opinion of the Supreme Court in National Woodwork than that the Congress

intended that this vital problem created by advanced technology should be solved by the parties through their collective bargains. Unfair labor practices were much too blunt as instruments for such delicate and schematic resolution.

> "Before we may say that Congress meant to strike from workers' hands the economic weapons traditionally used against their employers' efforts to abolish their jobs, that meaning should plainly appear. '[I]n this era of automation and onrushing technological change, no problems in the domestic economy are of greater concern than those involving job security and employment stability. Because of the potentially cruel impact upon the lives and fortunes of the working men and women of the Nation, these problems have understandably engaged the solicitous attention of government, of responsible private business, and particularly of organized labor.' Fibreboard Paper Prods. Corp. v. National Labor Relations Board, 379 U.S. 203, 225, 85 S.Ct. 398, 411, 13 L.Ed. 2d 233 (concurring opinion of Stewart, J.). We would expect that legislation curtailing the ability of management and labor voluntarily to negotiate for solutions to these significant and difficult problems would be preceded by extensive congressional study and debate, and consideration of voluminous economic, scientific, and statistical data. The silence regarding such matters in the Eighty-sixth Congress is itself evidence that Congress, in enacting §8(e), had no thought of prohibiting agreements directed to work preservation." (386 U.S. at 640, footnote omitted).

National Woodwork has additional insights for us. Not only did it hold that work preservation arrangements by the

parties themselves were not within the secondary boycott provisions of the Act, it set the boundaries of §8(b)(4)(B) and §8(e) by inclusion as well as exclusion. When a boycott was used as a shield to protect jobs, it was not an unfair practice. But woe to the union which used the boycott as a sword, to reach out to the jobs of others when their own jobs were not threatened (386 U. S. at 630-31).

This Court in NLRB v. National Maritime Union, 486 F.2d 907, 912-914 (2d Cir. 1973), cert. den. 416 U. S. 970, faced there with the issue, whether the charged conduct was the prohibited "sword" or protected "shield", looked analagously to the Board and Circuit holdings treating with the problem of subcontracting. It determined, that when the contractual provision was to preserve the work--the employees wages, hours and working conditions--a union standards provision, it was valid, the protected shield. When the conduct, however, was a reaching out, not concerned with the interests of the employees in the bargaining unit, but instead in the union's "hope of making a gain on another front", such contractual provision constituted the proscribed sword and was invalid. Consequently, this Court has tracked the dictates of National Woodwork that conduct seeking

the unit's work preservation remains primary and lawful, whereas conduct which represents the condemned "hot cargo", "unfair products" and "do not handle" concepts--the reaching out--is invalid.

Highly significant, the Board has recently used National Maritime Union, supra, often referred to as Commerce Tankers in Board opinions, as a springboard to explain its understanding of the object of the secondary boycott sections of the Act, and particularly §8(e). The concern of Congress said the Board in International Union of Operating Engineers (Tru-Mix Construction Co.), 221 NLRB No. 124, 1975-76 CCH NLRB ¶16,434, was with (a) "hot goods", (b) "unfair materials" or "blacklisted" products or (c) the withholding of services from an "unfair" employer (text at Board's footnote 7). It is plain that those were Congress' targets. The Courts and the Board are in agreement, then, that work preservation clauses aimed at preserving the work rather than the union, were not proscribed.

It is unquestioned that at bar, the parties sought and concluded--solely to preserve their working conditions, to preserve their agreed upon 20% of container work, analagous to the union standards clause--a typical "shield" and nothing more.

National Woodwork makes yet another point, namely, that bargaining with respect to work preservation is required of the parties, that a failure so to bargain was itself an unfair labor practice.

> "Moreover, our decision in Fibreboard Paper Prods. Corp., supra implicitly recognizes the legitimacy of work preservation clauses like that involved here. Indeed, in the circumstances presented in Fibreboard, we held that bargaining on the subject was made mandatory by §8(a)(5) of the Act, concerning as it does "terms and conditions of employment," §8(d). Fibreboard involved an alleged refusal to bargain with respect to the contracting-out of plant maintenance work previously performed by employees in the bargaining unit. (386 U. S. at 642).

Finally, the Supreme Court pointed to the anomaly that would arise if what the parties were required to do under §8(a)(5) became unlawful under §8(b)(4)(B) or §8(e).

> "It would therefore be incongruous to interpret §8(e) to invalidate clauses over which the parties may be mandated to bargain and which have been successfully incorporated through collective bargaining in many of this Nation's major labor agreements". (386 U.S. at 643)

It will be much more than merely incongruous if such work preservation clauses, concerning which the parties are mandated to bargain by the National Labor Relations Act, and which obligation they have surely discharged by their bargain, can be

considered to be a violation of Section 8(b)(4)(B) and Section 8(e) of the Act. Here the result of the incongruity is that the essence of the parties' bargain to accommodate to technological changes, their programs and designs, each measure fitted to the overall scheme, tracking national labor policy as enunciated by the Congress and the Supreme Court, is summarily destroyed. Labor peace in the longshore industry again is to be buffetted by the irrational gales which the National Labor Relations Board says may not be tamed by collective bargaining dealing with the meaningful problems of work preservation and technological change. The disaster will spread from the longshore industry to the interdependent maritime industries of the Port and to the citizenry of a Port that is no longer competitive.

CONCLUSION

The Board's decision in this case is unique. It flies in the face of the decisions of the Supreme Court in National Woodwork, of this Court in Intercontinental Container, and National Maritime Union, of its own decision in Tru-Mix Construction. It has, as well, threatened to reduce labor peace in the longshore industry in New York to desperate straits. Those

unpleasant facts along would not, however, have prompted the Port Council to file this brief. It is the clear and present danger to the other allied maritime industries of the Port, to the competitiveness of the Port, to the citizens of the City who are dependent upon the Port for their livelihood, which motivates the Port Council to urge the case of petitioners that the Board's order be denied enforcement.

Respectfully submitted,

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ESTHER WALDMAN, being duly sworn, deposes and says: Deponent is not a party to the action, is over 18 years of age and resides at 350 Fifth Avenue, New York, N. Y. On January 23, 1976, deponent served two copies of the within Brief Amicus Curiae on the following interested parties in this action, at the addresses designated by said attorneys for that purpose, by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in a post-office, official depository under the exclusive care and custody of the United States Postal Service within the State of New York:

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